No. 12028.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST E. BRIDGMAN and JAY C. HENSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S WRITTEN REPLY ARGUMENT.

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APPELLEE'S WRITTEN REPLY ARGUMENT.

May It Please the Court and Counsel for the Defendant Henson:

The Written Argument of appellant Henson appears to be based upon the following grounds:

1. The good faith of the accused;

2. The credibility of the witnesses;

3. Appellants Henson and Bridgman did not know each other;

4. Appellant was an independent contractor;

5. Appellant was denied a fair trial because he was tried together with other defendants and the trial took 59 days.

GOVERNMENT'S REPLY.

I.

The Good Faith of the Accused Is a Jury Question.

Questions of good faith, honest belief, intentions and purpose are questions which are properly within the province of the jury to decide, and the jury having decided these questions against the appellant, the Appellate Court cannot consider these questions unless it is pointed out that there is no substantial evidence to warrant an inference of the guilt of the appellant.

Durland v. United States, 161 U. S. 306, 313, 314, 315;

Hawley v. United States, 133 F. 2d 966, 970 (C. C. A. 10);

Bradford v. United States, 129 F. 2d 274, 277 (C. C. A. 5);

Nassan v. United States, 126 F. 2d 613, 615 (C. C. A. 4);

Gates v. United States, 122 F. 2d 571, 575, 576 (C. C. A. 10).

If there was any conflict in the evidence, all conflicting inferences therefrom are resolved against the appellant.

Lemien v. United States, 158 F. 2d 550, 552 (C. C. A. 5).

II.

The Credibility of Witnesses Is a Jury Question.

Likewise the question of the credibility of the witnesses is strictly within the province of the jury and the Appellate Court will not concern itself with the credibility or comparative reasonableness of testimony.

Gage v. United States, 167 F. 2d 122 (C. C. A. 9);

United States v. Compagna, 146 F. 2d 524, 526 (C. C. A. 2), cert. den. 324 U. S. 867;

Craig v. United States, 81 F. 2d 816, 828 (C. C. A. 9, 1936), cert. den. 298 U. S. 690.

ADDITIONAL SETTLED PRINCIPLES PERTAINING TO APPEALS.

The following well-settled principles on appeal are an additional answer to appellant's contentions:

(1) Appellate Courts Will Indulge All Reasonable Presumptions in Favor of the Trial Court.

Appellate Courts will consider the evidence most favorable to the prosecution and will indulge in all reasonable presumptions in support of the trial court's ruling and draw all inferences permissible from the record, in determining whether the evidence is sufficient to sustain a conviction.

This Circuit has rather recently reiterated this familiar principle, in the cases of:

Gage v. United States, 167 F. 2d 122 (C. C. A. 9);

Henderson v. United States, 143 F. 2d 681 (C. C. A. 9).

(2) An Appellate Court Will Rarely Substitute Its Views on the Weight of the Evidence, for Those of the Jury.

The fact that the Appellate Court might have reached a different conclusion from that of the jury, on certain questions involved, will not justify the Appellate Court in substituting its views on the weight of the evidence, for those of the jury. To this effect:

Jordan v. United States, 87 F. 2d 64, at p. 67 (C. C. A., D. C.).

(3) The Weight of the Evidence Is a Jury Question.

Normally, the weight of the evidence and the extent to which it was contradicted or explained away by witnesses, on behalf of the defense, is exclusively for the jury.

Crumpton v. United States, 138 U. S. 361.

(4) The Sufficiency of the Evidence Is a Jury Question.

The above rule has frequently been announced in this Circuit. Fairly recent cases of this Circuit, and of another Circuit, on this proposition, are the following:

Gage v. United States, 167 F. 2d 122 (C. C. A. 9);

Yoffee v. United States, 153 F. 2d 570 (C. C. A. 1);

Hemphill v. United States, 120 F. 2d 115 (C. C. A. 9), cert. den. 314 U. S. 627.

III.

To Sustain a Conviction for Violation of the Mail Fraud Statute (18 U. S. C. 338) It Is Not Necessary That the Participants Know Each Other.

The general rule is that a party to a conspiracy or scheme may have limited knowledge as to the scope thereof, the details of the plan, or the operations, and he need not have complete knowledge of the membership of the conspiracy or the part played by each of the members.

> *Marino v. United States,* 91 F. 2d 691, 694, 696 (C. C. A. 9, 1937).

After a scheme commenced, those persons who entered the scheme with knowledge thereof, *i. e.,* to sell vending machines as directed by the defendant Rhodes, became partners in the scheme and were bound by all the acts and things done by all the participants both prior to that time and afterwards in furtherance of the scheme. A person may become a part of the scheme and yet have a very limited knowledge of the scope, the parties and details thereof. It has been held that *a person need know only the purpose of the conspiracy.* (Emphasis ours.)

In *Craig v. United States, supra,* this Court stated at page 822 as follows:

> "Nor does the alleged fact that McKeon entered the conspiracy after it was formed by the appellants affect the existence of the general scheme. 'Such a conspiracy may be a continuing one; actors may drop out, and others drop in; the details of operation may change from time to time; the members need not know each other, or the part played by others; a member need not know all the details of the plan or the operations; he must, however, know the purpose of the conspiracy and agree to become a party to a

plan to effectuate that purpose. A conspiracy is bottomed on an agreement to accomplish an illegal act, and without such agreement there can be no conspiracy; a conspiracy "is a partnership in criminal purposes." ' Marcante v. United States (C. C. A. 10), 49 F. (2d) 156, 157; Johnson v. United States (C. C. A. 9), 62 F. (2d) 32, 34."

See also:

United States v. Manton, 107 F. 2d 834, 848 and 849 (C. C. A. 2, 1938), cert. den. 309 U. S. 664;

Lee v. United States, 106 F. 2d 906 (C. C. A. 9);

Marino v. United States, 91 F. 2d 691 (C. C. A. 9, 1937);

Coates v. United States, 59 F. 2d 173, 174 (C. C. A. 9).

The reporter's transcript fully supports that:

The appellant understood the purpose of the scheme, *i. e.,* to sell vending machines; he used the same plan and scheme which was devised by the defendant Rhodes to procure prospective victims by placing a false ad in a newspaper which read that an established vending machine route was for sale well knowing that no such route had been established by him or anyone else; appellant used the same brochures prepared and furnished by Rhodes which stated that there was nothing in the vending machines to get out of order, were 100% foolproof, and absolutely no risk involved, etc., knowing that each statement was false and fraudulent. A definite pattern was adhered to; the logical inference is the adoption of a common scheme. If any one of the material representations made

were false and known to be false and purchases were made in reliance thereon, the conviction must be sustained.

Lewis v. United States, 38 F. 2d 406, 410 (C. C. A. 9).

Each salesman was required to collect at least 50% down, and all the checks or remittances were made payable to Los Angeles Manufacturers (a fictitious firm name used by Rhodes), which were received by him and deposited to his own bank account; that salesman did not receive the final payment from Rhodes until the purchaser paid in full for the machine. Defendant Rhodes furnished the sales agreements and other literature containing instruction to the salesmen how to procure and make sales and sent by mail an acknowledgment of each order to the purchaser. The prime essential element is the use of the mails for the purpose of executing or attempting to execute a fraudulent scheme.

Marshall v. United States, 146 F. 2d 618 (C. C. A. 9).

The appellant knew that every order sent in to defendant Rhodes would be acknowledged by him and upon shipment of the order a sight bill of lading would be sent through the mails.

It was not necessary that each of the schemers know the other. See:

United States v. Cohen, 145 F. 2d 82, 87, 88, 90 (C. C. A. 2), cert den. 323 U. S. 799;

Lefco v. United States, 74 F. 2d 66, 69 (C. C. A. 3).

The appellee submits that the appellant understood the venture and knew the scheme in all its details and that by direct testimony and the inferences drawn from the evidence, the jury could rightly find that the appellant knew the purpose of the scheme.

In *Blumenthal v. United States,* 332 U. S. 539 (an affirmation of the Ninth Circuit Court of Appeals, 158 F. 2d 883), at page 556, it is said:

> "And not all of those joining in the earlier ones make known their participation to others later coming in.
>
> "The law does not demand proof of so much. For it is most often true, especially in broad schemes calling for the aid of many persons, that after discovery of enough to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undiscovered and undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others."

Marino v. United States, 91 F. 2d 691 (C. C. A. 9, 1937);

Lefco v. United States, 74 F. 2d 66 (C. C. A. 3);

Jezewski v. United States, 13 F. 2d 599, 601 (C. C. A. 6);

Allen v. United States, 4 F. 2d 688, 690 (C. C. A. 7).

And the language in *Blumenthal v. United States,* above noted, is applicable where it is said at page 558:

> "The scheme was in fact the same scheme; the salesmen knew or must have known that others unknown to them were sharing in so large a project; and it hardly can be sufficient to relieve them that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal."

The record clearly supports the finding of the jury that there was a purpose—to dispose of vending machines designed and manufactured by the defendant Earl H. Rhodes by means of false representations and the mails were used in the furtherance of this scheme.

IV.

The Evidence Was Sufficient to Warrant the Jury Finding That the Appellant Was Not an Independent Contractor.

The appellant further contends that he was an independent contractor and therefore comes within the confines of the *Kotteakos* case, 328 U. S. 750. Part of the plan and scheme was to call the salesmen *distributors*. However, such designation did not actually make them *distributors* for the facts clearly demonstrate that they were merely agents and co-conspirators of the defendant Rhodes. The jury was justified in so finding, and the appellee submits that the common purpose of selling vending machines for the defendant Rhodes, in the manner which we have already outlined, was sufficient for the jury to draw an inference that he was not an independent contractor.

The case of *Blumenthal v. United States, supra,* substantially disposes of appellant's contentions concerning the existence of several independent conspiracies rather than one general conspiracy. It is enough, knowing that concerted action was contemplated and invited, and that the appellant gave his adherence to the fraudulent scheme and participated in it.

V.

No Reversible Error Was Committed by Trying the Appellant Together With Co-Schemers in a Trial Which Took 59 Days.

The *Kotteakos* case, relied upon by the appellant, does not support his contention that he was denied a fair trial because several defendants charged under the mail fraud statute were tried jointly. (See pages 13 and 14, Appellee's Brief.) Those joining in a scheme to use the mails to defraud take the risk of being tried together and cannot complain unless some prejudice has been shown. The appellee submits that the record shows that the court was zealous to protect the rights of the appellant, and that the delays, if any, were caused by the procrastination of the appellant himself. It is not unusual when many are charged in a conspiracy or scheme that considerable time is necessary to fairly present the case before the jury; *e. g.,* in the conspiracy trial of *United States v. Foster, et al.,* involving eleven Communists tried in the Southern District of New York before Judge Harold Medina, the trial commenced on March 7, 1949, and ended on October 14, 1949, consuming 33 weeks.

The record is silent in this case of any request by the appellant for a severance and, therefore, by his failure to so request, he has acquiesced and consented to a joint trial.

Finally, appellant has failed to show that during the trial his substantial rights have in any manner been prejudiced.

Conclusion.

We respectfully submit that the evidence upon which the jury found appellant guilty plainly furnishes adequate support for that verdict.

Appellant had a fair and full trial. There is no reason for setting aside the verdict of the jury, and the judgment should be affirmed.

Respectfully submitted,

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